JD-27-10
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KINGSBURY, INC.,

Cases 4–CA–36746
and 4–CA–37077
4–CA–37086

KINGSBURY SHOP EMPLOYEES' ASSOCIATION
a/k/a THE SHOP COMMITTEE.

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of Philadelphia, Pennsylvania, for the General Counsel
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of Philadelphia, Pennsylvania for the Charging Party

DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases arise in the context of an industrial bearings manufacturer and its employees' union that, having failed to negotiate a successor labor agreement, were operating under the employer's unilaterally implemented terms and conditions of employment. The cases involve the Government's allegations that the employer violated the National Labor Relations Act (Act) in three distinct ways: by contracting out a portion of a customer's order that would typically be performed by the bargaining unit; by failing to provide requested employee information to the Union for over four months; and by discharging the union's president, allegedly for "interfering with production."

Statement of the Case

On May 5, 2009, the Kingsbury Shop Employees' Association (KSEA or Union) filed a charge with Region 4 of the National Labor Relations Board (Board) alleging violations of the Act by Kingsbury Inc. (Kingsbury). The case was docketed as Case 4–CA–36746. The charge was amended by the Union on July 22, 2009.

On July 24, 2009, the Board's General Counsel, by the Regional Director of Region 4, upon investigation of the Union's charge, issued a complaint alleging that Kingsbury violated the Act by subcontracting the production of four CH housings and by unilaterally implementing certain new terms and conditions of employment after expiration of the parties' labor agreement.

On September 29, 2009, the Union filed another charge with Region 4, alleging violations of the Act by Kingsbury regarding Kingsbury's failure to provide requested wage information. This charge was docketed as Case 4–CA–37077.

On October 6, 2009, the Union filed another charge, docketed as Case 4–CA–37086, alleging Kingsbury violated the Act by terminating Union President Steven Landis.

On November 24, 2009, the Board's General Counsel, by the Director of Region 4, issued a complaint in Case 4–CA–37077, alleging Kingsbury violated the Act by failing and refusing to provide requested wage information to the Union. On November 25, 2009, the Regional Director issued an order consolidating Cases 4–CA–36746 and 4–CA–37077.

On December 11, 2009, the Board's General Counsel, by the Director of Region 4, issued a complaint in Case 4–CA–37086, alleging that Kingsbury violated the Act by discharging Union President Landis. Also on December 11, 2009, the Regional Director issued an order consolidating Case 4–CA–37086 with the two previously consolidated cases (4–CA–36746 and 4–CA–37077).

Kingsbury filed answers to each complaint denying that it violated the Act.

By order issued January 12, 2010, based on a settlement reached by the parties, the Regional Director withdrew the allegations of the complaint in Case 4–CA–36746 that alleged a violation of the Act by the unilateral implementation of certain terms and conditions of employment.

A trial in these cases was conducted before me on January 15, 2010. Counsels for the General Counsel and the Employer filed briefs in support of their positions on February 22, 2010. On the entire record, I make the following findings, conclusions of law, and recommendations.[1]

JURISDICTION

The complaints allege, Kingsbury admits, and I find that at all material times Kingsbury has been engaged in designing and manufacturing tilt-pad, fluid film thrust and journal bearings for rotating machinery at its plant on Drummond Road in Philadelphia, Pennsylvania (Philadelphia operation). Kingsbury also avers, and I find, that at all material times it has also been engaged in designing and manufacturing rolling element ball and roller bearings for rotating machinery. The complaints allege, Kingsbury admits, and I find, that during the past year, Kingsbury, in conducting its business operations, has purchased and received at the Philadelphia operation goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The complaints further allege, Kingsbury admits, and I find, that at all material times, Kingsbury has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaints further allege, Kingsbury admits, and I find based on the record evidence, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

[1]The General Counsel's unopposed posthearing motion to correct the record is granted, as follows: at line 12 of p. 84 of the transcript, the record is corrected to reflect that the sentence following the word "Yes," on line 12 and ending on line 13 with "are they?" is a question that counsel for the General Counsel asked of the witness. The witness's answer to this question begins on line 14 of p. 84 of the transcript.

UNFAIR LABOR PRACTICES

Background

Kingsbury manufactures two types of bearings at its Philadelphia operation. One is a roller bearing and the other a bearing which relies on a film of oil, water, or hydraulic fluid. These bearings are large items, manufactured for the oil and gas industry, the U.S. Navy, and for use in nuclear power plants. These are highly engineered products, and Kingsbury's director of Philadelphia manufacturing operations, Steven Koltenback, estimated that 85-90 percent of the work at the Philadelphia operation was custom work, as opposed to "repeat business."

Kingsbury employs approximately 40 shop employees at the Philadelphia operation. Shop employees (who have completed their 120-day introductory period) are represented for purposes of collective bargaining by KSEA. KSEA is an unaffiliated independent union that has represented the Kingsbury Philadelphia operation shop employees since about 1967.

The Union and Kingsbury were parties to a three-year collective-bargaining agreement that expired December 15, 2008. The parties have yet to reach a successor agreement. Employees worked under the existing terms and conditions of employment until January 21, 2009, when Kingsbury declared an impasse and implemented its pending contract proposal.[2]

A. The Contracting Out

i. Facts

The production and machining of C housings and CH housings is work that is generally performed by the bargaining unit employees. C and CH are different parts of the housings manufactured by Kingsbury and different equipment is required to machine each type. (Union Vice President Jeffrey Johnson testified that CH housings have an oil reservoir that the C housings do not have.)

In December 2008, prior to the expiration of the parties' collective bargaining agreement, Koltenback approached Union President Steven Landis and Union Vice President Jeffrey Johnson on the shop floor at their workstations and informed them that Kingsbury needed to contract out a customer order for C housings. Koltenback asserted that a lack of machine availability and a lack of man hours warranted this contracting out. Landis and Johnson told Koltenback that they wanted to speak with other union committee members. Johnson explained at the hearing that neither he nor Landis machined housings as part of their work, so they wanted to talk with a committee member more familiar with this aspect of the operation before agreeing to Koltenback's request.

They talked with employee Al DeRita. DeRita confirmed to Landis and Johnson that "yes, there was a log jam in the area. He said [the contracting out] wouldn't be an issue to . . . the guys that machine the housings." However, DeRita added that that "there were other parts to the housings that he was concerned about." Specifically, "[h]e wanted to know what was going to happen with the CH parts of the housings."

[2] The lawfulness of this implementation was disputed by the Union, and the Government, but complaint allegations regarding it were withdrawn prior to the hearing as part of a settlement.

Landis and Johnson approached Koltenback about this. Johnson's undisputed and credited testimony was that "Koltenback [ ] assured us that CH housings would be done in house."

Landis and Johnson told Koltenback it was "okay to send out the C houses," and Johnson handwrote up a document "to preserve what we agreed on." The document, dated December 3, 2008, and signed by Landis as KSEA President, read:

> Management,
>
> In the interest of preserving our labor agreement, we the KSEA shop committee have agreed to the outsourcing of the 5 "C" housings. (13")[.]
>
> The KSEA Shop Committee stipulates that this is a "One Time Deal" and ask that we be kept abreast of any and all additional outsourcing needs.

On January 16, 2009, the Union received a notice from Koltenback stating that four CH housings were being outsourced. The notice stated:

> We have exhausted all overtime options for the past two weeks. Our only option to maintain customer requirements is to outsource. In keeping with our commitment to KSEA, we will outsource the following job to maintain production requirements.
>
> J501417–001 for a quantity of four (4), CH housings.

The same day the Union received this notice, January 16, Johnson and others observed the CH housings being taken from DeRita's and another employee's machines and being put on a truck to be sent out.

Koltenback testified about the decision to contract out the customer order for CH housings. The order composed five CH housings, and the original intent was to produce all of them in house. The first was completed when Kingsbury decided that in order to be assured of meeting the customer's demand that the remaining four should be contracted out. While citing a variety of reasons that he believed Kingsbury needed to contract out the order (most of which the Union disagreed with, as set forth in Johnson's testimony and the grievance filed by the Union), Koltenback admitted that the December 3, 2008 agreement with the Union on outsourcing played a role in the decision. Koltenback agreed that the December 3, 2008 agreement referred to C housings, and the January 16, 2009 outsourcing involved CH housings. He also agreed that they are two different housings. However, Koltenback explained, essentially, that when he outsourced the CH housings he mistakenly recalled that the December 3, 2008 agreement covered the outsourcing of all housings, not just C housings:

> I guess my memory at the time . . . when I actually outsourced the CH housings, my recollection was that [in the December 3, 2008 agreement] we were actually soliciting agreement from the KSEA to outsource all housings.

ii. Analysis

The Government alleges that the contracting out of the CH housing, without providing the Union with advance notice and an opportunity to bargain, violated Section 8(a)(5) of the Act.

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees." 29 U.S.C. § 158(a)(5).[3] "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). An employer violates Section 8(a)(5) of the Act if it makes a material unilateral change during the course of a collective-bargaining relationship on matters that are a mandatory subject of bargaining. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." *Katz*, supra at 743; *United Cerebral Palsy of New York City*, 347 NLRB 603, 606 (2006).

"Subcontracting of bargaining unit work that does not constitute a change in the scope, nature, or direction of the enterprise but only substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining." *Spurlino Materials, Inc.*, 353 NLRB No. 125, slip op. at 21 (2009). See, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace"); *St. George Warehouse, Inc.*, 341 NLRB 904 (2004) ("Respondent's unilateral transfer of unit work to temporary agency employees violated Section 8(a)(5) and (1)"), enfd. 420 F.3d 294 (3d Cir. 2005).

Before taking any unilateral action on a mandatory subject of bargaining, an employer is required to provide the Union with advance notice and an opportunity to bargain. "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the Union of a fait accompli." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (footnotes omitted), enfd. 722 F.2d 1120 (3d. Cir. 1983). "[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel*, 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals*, 342 NLRB 787 fn. 4 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

In this case, it is not seriously disputed, that in January 2009, Kingsbury contracted out bargaining unit work—the production of the CH housings—without advance notice to the Union and, therefore, without providing the Union with an opportunity to bargain about Kingsbury's desire to contract out the work. This work was—indeed Kingsbury admits that it was (GC Exh. 1(g) at ¶7(c))—a mandatory subject of bargaining. The contracting out materially affected the employees: when shipped out the work was taken from employees' machines, the Union's grievance asserted that four employees lost work because of the outsourcing, and Kingsbury paid an outside contractor $53,700.00 to do the job. No notice was provided to the Union: the work was taken out of the plant on January 16, 2009, the same day that the Union was notified of Kingsbury's intent to contract out the work, clearly inadequate notice to permit bargaining. The contracting out, in fact, was a subject eminently suitable for bargaining and discussion had advance notice been provided. Indeed, in December 2008 Kingsbury had approached the

[3] In addition, an employer who violates Sec. 8(a)(5) derivatively violates Sec. 8(a)(1). *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

Union about its desire to contract out C housings, and after discussion the Union agreed with Kingsbury on that contracting out.[4]

In agreeing to the contracting out of the C housings, the Union made clear that it was not waiving its right to insist on bargaining about, and to oppose other incidents of subcontracting. Indeed, internally, at the time, the Union discussed its concern about the making sure the CH housing work was not similarly contracted out. The Union's letter to management agreeing to the C housing outsourcing states that the Union "stipulates that this is a "One Time Deal" and ask that we be kept abreast of any and all additional outsourcing needs." Given that any waiver of the right to bargain over a mandatory subject such as this must be "clear and unmistakable,"[5] it is obvious that there was no such waiver in this case with regard to the CH housings work. Kingsbury—whose burden it is to show such a waiver,[6] makes no such claim.[7]

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[4]Kingsbury asserts (R. Br. at 11) that, notwithstanding its failure to bargain, "due to a lack of capacity [ ] the four 'CH' housings at issue could not have been performed by the bargaining unit." The January 16 notice attributed the problem to "exhaust[ion]" of "overtime options." In any event, these contentions should have been put to the Union in the bargaining process. They are not a defense to the failure to bargain. As the Supreme Court explained in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211, 214 (1964):

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. . . . To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace. . . .
> . . . [A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation. (footnote omitted.)

[5]*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[6]Proof of a contractual waiver is an affirmative defense "which must meet a high standard" and it is the Respondent's burden to show that a contractual waiver is "'explicitly stated, clear and unmistakable.'" *AlliedSignal Aerospace*, 330 NLRB 1216, 1228 (2000) (quoting *Lear Seigler, Inc.*, 293 NLRB 446, 447 (1989)), review denied, 253 F.3d 125 (D.C. Cir. 2001); *General Electric*, 296 NLRB 844, 857 (1989), enfd. mem. 915 F.2d 738 (D.C. Cir. 1990).

[7]Kingsbury does not claim the Union waived its right to insist on bargaining under the expired contract, the terms and conditions of which employees were working under at the time of the contracting out decision. The expired contract does contain provisions outlining the circumstances under which contracting out may be allowed. See, GC Exh. 2, Sec. 109 B "Subcontracting." That clause provides for a multifactor conjunctive test, each prong of which must be satisfied before work can be subcontracted. Based on the undisputed testimony, a number of the provisions were not satisfied, and, in any event, "[i]t is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary." *Ironton Publications*, 321 NLRB 1048 (1996). These issues require no further consideration as Kingsbury does not argue that its subcontracting of the CH housings was in accordance with the terms of the expired labor agreement.

Kingsbury, for its part, through Koltenback, essentially admitted that when he ordered outsourcing of the CH housings, he relied on his mistaken recollection that the December 2008 agreement with the Union permitted the outsourcing of all housings, not just the C housings.

That mistake is not a defense to the General Counsel's contention that Kingsbury had a duty to notify and offer to bargain about its interest in subcontracting the CH housings order. *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 256 (2006). Indeed, more generally, with regard to unilateral changes, motive is not relevant. A unilateral change in a mandatory subject is a per se breach of the section 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *NLRB v. Katz*, 369 U.S. at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. . . an employer's unilateral change in conditions of employment under negotiation is [ ] a violation of § 8(a)(5)").

Kingsbury's unilateral subcontracting of the CH housings, without providing advance notice to the Union and an opportunity to bargain, violated Section 8(a)(5) and (1) of the Act.[8]

B. The Information Request

i. Facts

As referenced, above, on January 21, 2009, Kingsbury implemented its bargaining proposal. The employees continued to work under these new terms and conditions. A key change from the status quo was the implementation of a more flexible wage and job structure that vested more discretion with management. Under the old contract, wages were established by job grade and class. Under the implemented terms, there was a pay-for-knowledge provision that involved the concept of employees earning a portion of their pay based on demonstrated knowledge of a second major job classification, which could be filled by an employee only when management chose to post and approve an opening for a second major job classification. It was within the Employer's discretion which employees received a posted second major job classification. The implemented terms also introduced the concept of a minor job classification, which, again, provided pay for employees based on their performance of certain minor jobs, some of which required the demonstration of the possession of certain skills.

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[8]I add that, given my resolution of this matter, I do not reach the question of whether, had notice been given, and had the parties bargained to impasse on the question of the subcontracting of the CH housings, whether the employer would have been privileged to implement the subcontracting of the CH housings. I mention this because the subcontracting occurred in the midst of negotiations for a new collective-bargaining agreement and it is well-settled that while negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, *unless and until an overall impasse has been reached on bargaining for the agreement as a whole*." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (emphasis added) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Accord, *Intermountain Rural Electric Ass'n*, 305 NLRB 783, 786 (1991) (during negotiations for a new collective bargaining agreement, absent union waiver of the right to bargain over an issue, "an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole") (footnote omitted), enfd. 984 F.2d 1562 (10th Cir. 1993).

Once these terms and conditions were implemented, the Union no longer knew what the employees were being paid. Previously, that was calculable, based simply on an employee's job classification and grade. But with the new system, the Union did not know which employees were receiving how much pay under the pay-for-knowledge provisions.

Accordingly, the Union requested a detailed list of all the employees' pay-for-knowledge premiums and wages. Initially, Landis requested this information orally at the end of April or early May 2009, from Hugo Mercoli, the plant's manufacturing manager, at the weekly Wednesday meeting conducted by Mercoli with the union committee members.

Mercoli said he would get the information for the committee. After a couple of weeks, the Union had not received the information and asked for it again at the next Wednesday meeting. Mercoli apologized, said that he had been busy and had not had a chance to provide the information, but that he would. A couple of weeks later the Union still had not received the information and Landis again asked Mercoli for it. This time Mercoli said that [h]e could show us on his computer, but he didn't think we were to have that information." Mercoli declined to provide the Union a copy of the information.[9]

On September 22, 2009, the Union requested the information in writing, and provided the written request to Mercoli. The letter, written and signed by Johnson as KSEA vice president, and addressed to "Kingsbury Management," stated:

> The KSEA is requesting a detailed summary of all shop employees[']
> wages, pay for knowledge premiums and 2nd major premiums, so that we can better serve our members."

Kingsbury responded the next day, September 23, 2009. In a memo from Koltenback, the Employer explained:

> We respect the privacy of each employee. It is our practice not to divulge employee's wages to anyone, except the employee.
>
> Kingsbury will review each employee's wage summary with the employees individually, upon their request.

The Union filed a grievance, which Kingsbury denied in a memo from Koltenback dated September 28, 2009. In this memo, Koltenback reiterated the position he had taken in the September 23 memo.

At that point, Koltenback consulted with counsel, who, according to Koltenback, "help[ed] us understand what our responsibility was." Shortly thereafter, on October 1, Kingsbury provided the requested information to the Union. However, the information was inaccurate. (The nature of the inaccuracies are not explained in the record.) A week or two later Kingsbury supplied an accurate copy of the requested information to the Union.

ii. Analysis

The General Counsel contends that Kingsbury violated the Act by failing to provide the

[9]These findings are based on Johnson's credited testimony. Mercoli testified but was not asked about this subject.

Union with requested and accurate wage information regarding the bargaining unit employees—first requested in late April or early May 2009—until mid-October 2009.

Board precedent with regard to this issue is well established:

> An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Dodger Theatricals*, 347 NLRB 953, 867 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *National Broadcasting Co.*, 352 NLRB 90, 97 (2008); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).
>
> Where the requested information concerns terms and condition of employment of employees within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). . . .
>
> Further, an employer must respond to the information request in a timely manner. *Woodland Clinic*, 335 NLRB 735, 736 (2006); *Samaritan Medical Center*, supra at 398; *Leland Stanford University*, 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Woodland Clinic*, [331 NLRB 735, 737 (2000)]; *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

Monmouth Care Center, 354 NLRB No. 2, slip op. at 41 (2009).

It is not incumbent on the General Counsel to prove that the Respondent was motivated by bad faith in failing to provide relevant requested information. Like a unilateral change, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *The Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *The Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

In this case the Respondent concedes that the requested information was relevant to the Union's representational duties (Tr. 20). It is hard to imagine information more relevant or central to the Union's role than wage information related to the employees the Union represents. In any event, no evidence was offered to defeat the presumptive relevance to the Union's duties of this requested information. *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 4 (1996).

This type of information—employee wages under the various implemented pay schemes—should have been readily available. The Respondent does not claim it was not. Apparently Mercoli had access to the information on his computer, but he refused to provide a copy of the information to the Union. The Union should have been provided this information within days—especially as the information was accessible on Mercoli's computer—of the first oral request. No explanation for Mercoli's failure to provide the information has been offered. (As referenced, above, Mercoli testified but was not asked about this issue.) Initially, he agreed to provide the information, but never did so. "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch 'as the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible.'" *Woodland Clinic*,

331 NLRB 735, 737 (2000) (Board's brackets), quoting, *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

Similarly, Koltenback refused to provide the requested information to the Union after the September 2009 written request, on grounds that the information was confidential and that individual wage information could be released only to an individual employee requesting his own wage information. This bald rationale does not pass muster under Board precedent,[10] as Koltenback apparently learned when he consulted counsel. Johnson's assertion at trial that the information provided October 1 was incorrect was not disputed by Kingsbury. No explanation for the provision of erroneous information or the reason for the delay until approximately mid-October to provide the correct information has been offered.

Kingsbury's failure and refusal to supply the wage information requested by the Union until mid-October 2009, violated Section 8(a)(5) and (1) of the Act.

C. The Discharge of Union President Landis

i. Facts

Kingsbury and the Union have long operated under an agreement providing that nonbargaining unit employees would not perform unit work at the Philadelphia operation without prior written request to the Union and agreement by the Union. A memorandum dated April 4, 2001, signed by the Union and the Employer, provided the formal basis for this agreement. It stated:

> AGREEMENT FOR USE OF NON BARGAINING UNIT PERSONNELL
>
> Employees and non-employees of this company not covered by the Collective Bargaining Agreement shall not perform any of the work regularly performed by employees covered by the agreement.
>
> In the event that Kingsbury Inc. deems it necessary to employ the services of any person(s) not covered by the Collective Bargaining Agreement to perform any of the work regularly performed by the employees covered by the agreement it shall first request permission of the KSEA. Said request will be in writing and contain the following:
>
> 1. Reasons for the use of non Bargaining Unit employees
> 2. Duties that will be performed
> 3. Equipment that will be used
> 4. Duration of use of non Bargaining Unit person[nel].
>
> The KSEA will make every effort to grant such requests and appreciates this opportunity [to] resolve this matter with you.

The Union viewed this agreement as still effective after expiration of the contract, and there is no evidence, or suggestion by Kingsbury, that it was not part of the implemented terms and conditions of employment.

Landis has worked at Kingsbury since 2004. He has been the president of the KSEA since approximately Spring 2008. He was involved in the failed negotiations, the dispute over

[10] *Bryant & Stratton Business Institute*, 321 NLRB at 1007 fn. 4 (1996).

the CH housings subcontracting, and the efforts of the Union to obtain wage information from Kingsbury. He signed the unfair labor practice charge, and the amended charge filed on behalf of KSEA in Case 4–CA–36746 (the subcontracting dispute).

On the morning of September 17, 2009, Landis was at work. Shortly after 8 a.m., he noticed an employee from Kingsbury's R&S division plant in Hatboro, Pennsylvania, was on the plant floor moving skids with an electric pallet jack. Landis knew the employee, Eric Shields (who used to work at the Philadelphia operation), was not supposed to be performing this bargaining unit work. No one from management had notified the Union that anyone outside the unit would be performing unit work at the Philadelphia operation.

When Landis saw Shields moving the skids, Landis "walked further down the shop floor" toward Shields, who was moving away from Landis. Landis yelled, ["]Yo, dude, stop. What are you doing?" Shields told Landis what he was doing and Landis told him, "they can't be having you do that." Landis mentioned to Shields that there were four employees on layoff and he told Shields he was going to see Hugo Mercoli about it. Landis' encounter with Shields lasted "a minute, maybe, if that."

Landis walked to the nearest phone on the shop floor, which was just a few seconds away, and paged Mercoli. However, Mercoli was in a production meeting in his office and, therefore, did not respond to the page. Landis went to Mercoli's office. Mercoli's office has a big window overlooking the shop and Landis saw through the window that Mercoli was having a meeting with some of the supervisors. Landis gestured through the window to Mercoli that he needed to come in and talk. Mercoli observed that Landis looked upset and waved Landis in. Landis entered and told Mercoli "I wanted to know why Eric was in there doing work, that he couldn't be in here doing work, because we had four guys on the street and that he needed to stop doing the work." Landis told Mercoli, "I have four fucking guys out on the street. I'm not going to have someone come in here from R&S and do their job." Landis told Mercoli that Mercoli had to get Shields to stop. Mercoli inquired further and Landis explained what he had seen, and told Mercoli that "I told [Shields] he had to stop what he was doing, cause I have four guys on layoff." Mercoli pointed out that Shields' moving pallets had nothing to do with the four employees (who were from different departments) being on layoff, but he did not disagree with Landis that Shields should not be moving the skids. Mercoli told Landis he would have someone else move the skids. Landis left, and Mercoli, along with the supervisor in charge of the area, went to find Shields. They found Shields in the shipping area and he explained what had happened, which was consistent with the account offered by Landis. The supervisor for the area who accompanied Mercoli then got a bargaining unit employee to move the skids instead of Shields. Mercoli walked toward the middle of the shop and found Landis. Landis made a point of telling Mercoli that he had not told Shields to stop the work, and Mercoli insisted that Landis had just told him that when Landis had entered Mercoli's office, and that Shields had also confirmed it. Landis walked away.

That day Mercoli discussed the incident with Koltenback. Koltenback asked Mercoli to put together a statement setting forth what had occurred and Mercoli prepared such a statement, which is dated September 17, the day of the incident. The subject line of Mercoli's memo is listed as "Employee interfering with production."[11]

[11]I deem it unnecessary to reprint Mercoli's memo here. It is in the record as GC Exh. 18. As mentioned, above, it is Mercoli's full account of the incident. It is essentially consistent with the account Mercoli gave at trial. It is mostly consistent with Landis' account as well, although it does repeat and emphasize the point that Landis told Shields to stop. Although the memo does

Continued

The next morning, September 18, around 10 a.m., Landis was paged by Union Vice President Johnson to a meeting in the cafeteria. He went accompanied by Johnson. When they arrived Mercoli was there, along with Ann Marie Heavey, the human resources manager, and Heather Traska, a human resources generalist. Koltenback and another individual were there. Johnson and Landis were told to sit. Koltenback read a termination notice to Landis explaining that he was discharged. The notice that Koltenback read was in the form of a memo from Koltenback to KSEA, dated September 18, and stated:

> Re: Steve Landis, Group I violation "N," "participation in a work stoppage, causing a production slowdown, or interfering with the rest of production."
>
> Steve Landis is hereby discharged for his action on 17 September 2009 as stated in the attached document;
>
> Date: September 17, 2009
> To: Steve Koltenback
> From: Hugo Mercoli (Manufacturing Manger)
> Subject: Employee interfering with production
>
> *Section 6.01 GROUP VIOLATIONS*
>
> *Violations of any of the following rules will be considered adequate cause for discharge for the first offense:*
>
> *N. Participation in a work stoppage, causing a production slowdown, or interfering with the rest of production.*

The memo referenced in the discharge notice was the statement prepared by Mercoli on September 17, at the direction of Koltenback that day.

After Koltenback read the memo, Heavey read Landis his rights under COBRA, which Landis told her he knew and did not need to hear. Landis told Johnson to contact the union's attorney and did not otherwise respond to Koltenback. Landis was escorted to the maintenance shop to retrieve some of his personal belongings, and was told he could make arrangements to retrieve the rest of his items over the weekend. With that Landis' employment ended.

Koltenback testified that he made the decision to discharge Landis. Asked why Landis was discharged, Koltenback testified:

> Primarily, that our contract and past contracts in Group 1 violations stipulates that for violation of Rule N or 15 in the previous contract for stopping work, or imposing, or restricting work that the immediate disciplinary action is discharge.

In fact, the rules to which Koltenback referred state that Group I violations are "adequate case for dismissal on first offense"—they do not stipulate or mandate "that the immediate disciplinary action is discharge." These rules are in the expired labor agreement and in the unilaterally implemented proposal, under Article VI, entitled "Rules of Conduct." Rule N (or 15) states: " Participation in a work stoppage, causing a production slowdown, or interfering with the

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not mention discipline, it is notable that the subject line of Mercoli's memo—"Employee interfering with production," which was the grounds for discharging Landis—suggests that the memo was prepared in anticipation of discharging Landis.

rest of production." According to Koltenback, the portion of that rule that Landis violated was "[i]nterfering, basically, with production."[12]

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[12]Section 6 of the implemented proposal, which contains the list of rules, including the one under which Landis was disciplined, states, in relevant part:

Section 6.00 RULES OF CONDUCT

The safe, orderly and efficient operation of the Philadelphia Division requires that certain standards of performance and conduct be maintained by all employees. The goal of this constructive discipline program is to provide a reasonable opportunity for you to correct any deficiency in performance and/or behavior. For violation of company rules and regulations, deficiencies in performance, or any other conduct that warrants action, the following steps will normally be taken:

NOTE: The following are intended to be guidelines and not hard and fast rules. These rules have been developed to assist in determining the appropriate disciplinary response and as such must be tempered with judgment, fairness, and common sense.

Any reference to company property includes inside the plant, office, on the company grounds or in company vehicles.

Three (3) factors will be considered in all applications of this constructive disciplinary program.

A. The seriousness of the offense.
B. The employee's past record.
C. The circumstances surrounding the particular case.

Types of Violations:

Group I violations: Misconduct considered adequate cause for dismissal on first offense.

Group II violations: Misconduct generally justifying a combination of written, suspension, probation or discharge.

Group III violations: absence, lateness, and early quit. Conduct generally justifying a combination of written, suspension, probation or discharge.

Section 6.01 GROUP I VIOLATIONS

Violations of any of the following rules will be considered adequate cause for discharge for the first offense:

* * * * * * * * * *

N. Participation in a work stoppage, causing a production slowdown, or interfering with the rest of production.

Asked if he considered anything other than the violation of this rule, Koltenback testified:

> In any union /management relationship, it's a cardinal rule to grieve second work first. So, in any violation, regardless, it should be the action of whoever has a complaint to come to management with that or grieve it, but not to interfere with whatever is taking place.

Koltenback agreed that it was "inappropriate for Mr. Shields to do the work that he was doing on that day" and agreed "that management ended up agreeing with [Landis], that [Shields] shouldn't be doing that work."

Koltenback insisted that Philadelphia operations management did not direct Shields to perform the bargaining unit work that he performed and would not have done so. Indeed, Koltenback denied that he or his management team at the Philadelphia operation had the authority to tell Shields to perform that work if they wanted to do so:

> No. Eric [Shields] works for a different division. I have no authority over that division. . . . I do not have authority to direct another division and its employees.

Asked to clarify these statements, Koltenback explained that he could stop Shields from engaging in misconduct or violating terms and conditions of employment generally: "it was our responsibility to stop him or any outside person who is not part of the bargaining unit." Koltenback compared Shields, an outside nondivision employee, to the employee of any outside supplier who comes onto plant property. He could be stopped from committing a violation of plant rules. For example, Koltenback explained "[i]f a supplier comes in and he's not wearing safety glasses, he's violating the safety rule, I would ask him to put his safety glasses on." Koltenback explained that the supplier would be expected to do that "[o]r he wouldn't be allowed in the facility." However, Koltenback explained that he did not have authority to direct Shields to perform work, any more than he could direct a supplier's employee: "in terms of directing him go do this work or that work, we do not. It's the same thing [as with a supplier's employee]."

The Union filed a grievance over Shield's performance of unit work. Kingsbury responded to the grievance on September 19, the day after Landis' termination, in a memo from Koltenback:

> Re: Grievance – Use of a non-bargaining unit member to move skids of work that could have been done by a bargaining unit member as per the document signed by both parties agreeing that there is to be no non-bargaining unit member doing any work without the consent of the KSEA.
>
> On the 18th of September 2009, an employee of the R&S division entered the Philadelphia building without the knowledge of management and moved skids of work without the knowledge or direction of management.
>
> On September 18th 2009, the R&S division was, again, directed by the Philadelphia division not to perform any work in the Philadelphia facility. Furthermore, the R&S division has been instructed to solicit the help of a Philadelphia KSEA employee in the completion of any work.

One final factual matter of potential relevance. The General Counsel elicited testimony from employees, undisputed by Kingsbury, that employees working in the shop are free to stop working, at their own discretion, even when not on break, to make and receive personal phone calls through the company phone system. When they take the time to make or receive a call, they, obviously, cease working for a few minutes. Similarly, there are coffee machines available to employees within another building in the facility. Employees are free, even when not on break, and again, at their own discretion, to cease work for a few minutes to go get a coffee and may bring it back to their workstation. If an employee is coming from the shipping and receiving area of the plant, this trip for coffee can take three to four minutes each way. In his testimony, Koltenback acknowledged these practices but added that they were not violations of any of the work rules of the contract (or implemented terms and conditions).

ii. Analysis

The General Counsel alleges that the discharge of Union President Landis violated the Act. He offers two distinct theories in support of this claim.

First, the General Counsel contends that Kingsbury discharged Landis in violation of Section 8(a)(1) of the Act for engaging in activities protected by Section 7 of the Act. The General Counsel contends that Landis was discharged for enforcing the existing terms and conditions of employment in the plant, which prohibited nonbargaining unit employees, such as R&S employee Shields, from performing bargaining unit work. This theory assumes that the motivation for Landis' discharge was, as Kingsbury asserts, his actions during the incident with Shields that allegedly "interfered with production" by causing Shields to stop moving the pallets while Landis talked to him, and then paged, and then went to find management.

Second, and alternatively, the General Counsel alleges that Landis was discharged in retaliation for his union activities. Under this theory, Landis' union activity, and not, as the Respondent claims, the incident with Shields, was the motivating factor in Landis' discharge. This theory, if proven, would constitute a violation of Section 8(a)(3) of the Act.

I will first consider the General Counsel's contention that Landis was unlawfully discharged, in violation of Section 8(a)(1), for his actions during the incident with Shields.

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Rights guaranteed by section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. An employee's discipline independently violates Section 8(a)(1) of the Act, without regard to the employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981).

However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984). "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996). See, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

"When an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to

remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002); *Ogihara America Corp.*, 347 NLRB 110, 112 (2006) ("The Board has held that where 'an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service'") (quoting, *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995), citing *Consumer Power Co.*, 282 NLRB 130, 132 (1986)).

"It is well settled, however, that not every impropriety committed in the course of Section 7 activity deprives the offending employee of the protection of the Act. A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employees unfit for further service." *J.W. Microelectronics Corp.*, 259 NLRB 327 (1981), enfd. mem. 688 F.2d 823 (3d Cir. 1982). "The employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978) (profanity), enfd. 628 F.2d 1283 (10th Cir. 1980).

.

In this case, the facts of Landis' actions are not in significant dispute. Landis saw Shields performing work that Landis, correctly, suspected to be bargaining unit work. He also knew that the existing terms and conditions of employment prohibited nonbargaining unit employees, including R&S employees from Hatboro, such as Shields, from performing this work. The Philadelphia operation head Koltenback agreed that Shield should not have been performing this bargaining unit work. Indeed, according to Koltenback, Shields was not authorized to do this work and had not been instructed or authorized to do it by management.

Landis approached Shields yelling "stop. What are you doing." When Shields told him, confirming Landis' concerns, he told Shields "they can't be having you do that," and Landis referenced that there were employees on layoff. Landis told Shields he was going to get Mercoli. Landis stepped away to a phone and paged Mercoli. When management did not respond he went to get Mercoli so that management could intervene. There is some dispute among the parties as to whether Landis told Shields to "stop" as a means of getting his attention to talk to him and find out what he was doing, or told him to "stop" performing the work. I find that the narrow dispute about Landis' use of the word "stop" not important. Without regard to the initial use of the word "stop," I agree that Landis conveyed to Shields that he should cease performing the work while Landis asked him what he was doing and then went, first to page, and then to find the manufacturing manager. Landis did not, in any way, force Shields to stop working. However, through his interaction with Shields, Landis intended to convey that Shields should stop working, he did convey this, and, on account of Landis, Shields did stop working while Landis went to get the plant's manufacturing manager Mercoli.

It is beyond cavil that an honest and reasonable assertion of collectively-bargained based rights—even if, unlike here, it is incorrect—is protected and concerted activity. *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and

reasonable invocation of a contractual right is protected and concerted activity); *Tillford Contractors*, 317 NLRB 68, 69 (1995).[13]

The Board's decision in *Tillford Contractors*, supra, is instructive. In that case a union job steward, Battoe, believed that another employees' presence at the job site, Baucum, "arguably" violated the contract if Baucum was there working as an area foreman. The steward Battoe approached Baucum, inquired whether he was there as an area foreman, threatened to file internal union charges against him, and told him, according to the credited testimony: "You've got no goddamn business being here," and "The best thing you could do is get the hell away from us." Baucum responded by attempting to call the union business agent to determine whether the contract prohibited him from being on the job. Unable to reach the business agent, he went to the employer's office and, along with the owner, reviewed the contract. They determined that, contrary to the union steward's view, the employee was permitted to work at the jobsite as an area foreman. Based on the steward telling the employee that he had no "goddamn" business being on the job, the employer discharged the steward because "he could not abide an employee 'talking back' and "sticking his nose where he had no business."

The Board found the employer violated the Act by discharging Battoe:

> Battoe, in attempting to ascertain Baucum's job status, was engaged in protected concerted activity. The information he sought was necessary in order to determine whether the Respondent was violating the collective-bargaining agreement. When an employee makes an attempt to enforce a collective-bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966). An employee making such a complaint need not specifically refer to the collective-bargaining agreement. As long as the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. . . .
>
> We find that Battoe did not engage in conduct which removed him from the Act's protection. His comments to Baucum that he had ''no goddamn business'' on the job and that ''the best thing [he] could do was to get the hell away,'' were directly related to his protected and concerted activity of attempting to enforce the collective-bargaining agreement. In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so ''flagrant, violent, or extreme'' as to render him unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). It is undisputed that Battoe did not threaten or engage in acts of violence. Further, although the Respondent characterizes Battoe's conduct as insubordinate, at most, his

[13]The cited cases involve enforcement of the terms of a collective-bargaining agreement. Here there was no contract in effect. Landis was seeking to police and enforce the existing terms and conditions of employment, which were based on the recently implemented proposal. The distinction, if it is of significance at all, could only bolster protection for Landis' conduct as any waiver of statutory contained in the labor agreement that might be implicated by the conduct "does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary." *Ironton Publications*, 321 NLRB 1048 (1996).

> conduct was profane and disrespectful. It is well established that some profanity and even defiance must be tolerated during confrontations over contractual rights. We find that Battoe's conduct was not so flagrant or extreme as to remove him from the Act's protection. We therefore find that the Respondent discharged Battoe for engaging in protected activity in violation of Section 8(a)(3) and (1) of the Act.

317 NLRB at 68–69 (footnote omitted).

The instant case is similar. It is not a very difficult decision to conclude that Landis was engaged in protected activity in his encounter with Shields. As in *Tillford Contractors*, Landis approached the employee he suspected of offending the terms and conditions of employment and asked him what he was doing there. Unlike the steward in *Tillford*, Landis did not threaten Shields, curse Shields, or tell him to "get the hell away from us." In *Tillford*, the challenged employee ceased working and began investigating whether he was supposed to be at the jobsite in the capacity of area foreman. Here, Landis did not leave it to Shields to figure that out: Landis paged and then went directly to the manufacturing manager, alerting him to the situation and Kingsbury management intervened in support of Landis. The essence of Landis' conduct was the protected and concerted activity of investigating, policing, and enforcing the terms and conditions of employment.

Kingsbury contends that Landis was not engaged in protected activity until he reported Shields to Mercoli. That is wrong. Landis' entire encounter with Shields, from his initial inquiry of Shields of what he was doing, to the efforts to have management intervene to end Shields' performance of bargaining unit work, was action taken as part of an effort by Landis to police and enforce the existing terms and conditions of employment. That was his purpose, and his actions and comments, particularly regarding the concern about laid off workers, fully support that conclusion. No other motive or purpose is even remotely suggested by the record or the parties.

It is equally clear that in this case, the portion of Landis' conduct to which Kingsbury objects—Landis causing Shields stop moving the pallets—was part of the res gestae of Landis' protected conduct of policing and enforcing the terms of conditions of employment. The act of having Shields stop moving pallets cannot be isolated from Landis' protected and legitimate conduct of questioning Shields and then immediately reporting the situation to management. Landis first yelled "stop" to Landis to speak to him and ask what he was doing. The direction (whether implicit or explicit) for Shields to stop moving the pallets was effective while Landis paged, and then went and found management so it could intervene. It was "directly related to his protected and concerted activity of attempting to enforce the collective-bargaining agreement." *Tillford*, supra. Even conceding, arguendo, that Landis should not have encouraged or directed Shields to stop moving the pallets while Landis went to get management, the direction was inextricably part of—it makes no sense apart from—Landis' effort to enforce the terms and conditions of employment.

In arguing that Landis' conduct was not protected, Kingsbury's chief contention is that Landis' conduct violated workrule N, in section 6.01 of the unilaterally implemented last offer (a rule that was also in the expired contract as rule 15 of section 6.01). That rule states that an employee's "Participation in a work stoppage, causing a production slowdown, or interfering with the rest of production" is "adequate cause for discharge."

Of course, Kingsbury cannot implement or enforce a rule that disciplines an employee for protected conduct. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("Respondent's disciplinary policy cannot, at any rate, lawfully 'mandat[e]' that Knight be discharged in violation of Sec. 8(a)(1)").

However, this is not Kingsbury's claim. Rather, Kingsbury contends that workrule N constitutes a waiver by the Union of employee rights statutory rights to engage in conduct, otherwise protected, that violates the rule. *NLRB v. City Disposal System*, supra at 837 ("if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods. No-strike provisions, for instance, are a common mechanism by which employers and employees agree that the latter will not invoke their rights by refusing to work. In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted").

However, in this case, the claim that the Union has waived its statutory rights through workrule N is unsustainable, for a number of reasons. The issue is one of waiver and workrule N—which is the no-strike clause contained in the expired contract—is of a kind typically found in labor agreements. It was reproposed, unchanged, and undiscussed as far as the record reveals, as part of Kingsbury's final offer that was unilaterally implemented in January 2009. The lawfulness of Kingsbury's implementation of its final offer is not at issue in these cases. But a unilateral implementation does not amount to or equate to a waiver of statutory rights by the Union. While the Union may have agreed to this no-strike clause as part of the contract in the past, and while one may expect that it would have agreed to this same clause in a new contract—no contract has been reached. The implemented final offer is not, contrary to the Respondent's shorthand description, an implemented contract. It is an implemented proposal, to which the Union has not bound itself, and through which Kingsbury cannot unilaterally impose a waiver of statutory rights. If, for instance, in response to Shields' performance of bargaining unit work, Landis had called a strike, Kingsbury would not be in a position to argue that the no-strike clause of the expired contract, or its unilaterally implemented proposal permitted it to discharge the employees for striking. See, *Industrial Hard Chrome LTD*, 352 NLRB 298, 311 fn. 11 (2008) (no-strike clause not enforceable to waive employees' right to conduct work stoppage after expiration of the contract and during bargaining for new contract). A strike would, to say the least, constitute interference with production far beyond that of which Landis is accused here. But be it a strike or telling an interloper to stop working while the union president checks it out with management, there is no waiver of statutory rights by the Union.[14]

Second, even assuming, very wrongly, that these unilaterally implemented workrules did constitute an agreed-to waiver of statutory rights, the claim that the rule against "interfering with the rest of production" waives Landis' otherwise protected conduct is untenable. The question is not whether the language of this phrase, plucked from the context of the rule itself, could conceivably be interpreted the way Kingsbury contends, but whether the contract—or other evidence—demonstrates a "clear and unmistakable" waiver of statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("we will not infer from a general contractual

[14]Kingsbury does not argue, and I am not aware of any evidence demonstrating that the parties intended this no-strike clause in the expired agreement to outlive the contract. Accordingly, the no-strike clause in the expired contract does not "live on" to waive statutory rights in the postexpiration period. *Ironton Publications*, 321 NLRB 1048 (1996).

provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'. More succinctly, the waiver must be clear and unmistakable"). "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Georgia Power Co.,* 325 NLRB 420–421 (1998) ("either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter"), enfd. 176 F.3d 494 (11th Cir. 1999); *Lear Siegler, Inc.*, 293 NLRB 446, 447 (1989) (waivers of employee rights must, however, be explicitly stated, clear and unmistakable). Proof of a contractual waiver is an affirmative defense and it is the Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *AlliedSignal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied, 253 F.3d 125 (2001); *General Electric*, 296 NLRB 844, 857 (1989), enfd. mem. 915 F.2d 738 (D.C. Cir. 1990).

Kingsbury claims that the portion of rule N barring "interference with the rest of production" was squarely violated by Landis, and any conduct that falls within that huge shadow has been waived. There is a fatuousness that dogs this claim. First, the phrase "interfering with the rest of production," on which the discharge is based, cannot be read in isolation from the entire rule. In *NLRB v. Mastro Plastics v. NLRB*, 350 U.S. 270, 318–322 (1956), the Supreme Court explained that a labor agreement, "[l]ike other contracts, [ ]must be read as a whole and in the light of the law relating to it when made."[15] Rule N is a no-strike clause, and it is directed toward prohibiting strikes, work stoppages, and thus the restrictions on "interfering with the rest of production" must be read in that context. It is farfetched, and there is no basis to suggest it comports with the parties' intent, to pluck the phrase "interfering with the rest of production" from its context in a no-strike clause and contend it constitutes a waiver of any conceivable conduct that impinges on or delays any aspect of the plant's operations in any way, for any reason, for even a few minutes. A point the General Counsel touches on, in a somewhat different argument, is apt: a coffee break, a phone call, a conversation, can be said to "interfere with production," as could arriving at work five minutes late because of highway traffic. One would be hard pressed to argue, and the Respondent disavows it, that those facets of industrial life were intended to be covered by the rule prohibiting "interfering with the rest of production." But Kingsbury's argument could sweep such innocuous conduct with the ambit of the rule's prohibition.

The Respondent's claim of waiver is even weaker when we consider the particular (and peculiar) circumstances to which it seeks to apply the rule in this case. It is not simply that the "production" that it claims Landis "interfered with" took only a few minutes, did not affect the plant's overall production, or the work of any other division employee. More importantly, the "production" that it claims Landis "interfered with" was the unauthorized movement of company property by an employee from another facility that management did not know was in the Philadelphia plant and who did not have permission to enter it. Koltenback was absolutely clear in his testimony: Shields was not authorized by management to perform the tasks which Landis halted him from doing for a few minutes until management came and backed Landis up. Given

[15]In *Mastro Plastics*, supra, the Supreme Court found that a no-strike clause stating that "there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members," and that prohibited "any strike or work stoppage during the term of this agreement" did not constitute a waiver of employees' rights to engage in unfair labor practice strikes.

Koltenback's enthusiastic endorsement of the Union's view that Shields had no business moving those pallets in the plant, one wonders if the term "production" can reasonably be applied to the performance of tasks *unauthorized, and unapproved by management.* If an outsider walked in off the street and began helping to load pallets, and Landis (or another employee) approached and asked him to stop while he went to alert management, would that too, under Kingsbury's sweeping view of this rule, constitute interference with production? If that example seems farfetched, it was the very one mooted by Koltenback, who in his testimony equated Shields to "any outside person" and opined that "[i]f management knew that Eric [Shields] was in the process of doing [the loading], it was *our responsibility* to stop him *or any outside person* who is not part of the bargaining unit." (emphasis added).

Assumingly wrongly that the no-strike rule was contractually binding, Kingsbury has not proven that the rule was intended to apply to this kind of conduct. It has not proven that through this rule the Union waived its right to enforce the terms and conditions of employment by halting a nonbargaining unit "outsider" from performing unauthorized bargaining unit work long enough to bring the situation to management's attention so that management can manage the plant. A "clear and unmistakable" waiver of otherwise protected and concerted conduct related to enforcing the conditions of employment has not been shown.

The question remains, quite apart from the issue of waiver, whether in carrying out this policing and enforcement of the terms and conditions of employment, Landis acted in a manner that would cause him to lose the protection of the Act. This seems to me, the proper issue in this case. Putting aside claims of waiver and "interfering with the rest of production," the question that matters is whether through his conduct, Landis lost the protection of the Act. *Tillford*, supra at 69 ("Having found that [employee] was engaged in protected concerted activity, we turn to the question whether he in some manner lost the protection of the Act").

In this case, the conduct which Kingsbury claims warrants Landis' discharge is that, as part of policing and enforcing the terms and conditions of employment, Landis had Shields stop moving pallets while Landis asked him what he was doing and while Landis went and sought management's assistance. There is nothing else. This is not a case about a discharge for opprobrious conduct. Landis did not curse Shields. He did not threaten Shields. He did not use or threaten physical force against Shields. He did not deride him or mock him. He did not force Shields to stop working. It is true that he was upset and spoke sharply to Shields, but if that were grounds for losing protection of the Act the Act would not cover very many people involved in labor disputes.[16] In any event, Landis' demeanor was not the basis on which Kingsbury claims to have discharged Landis.

As referenced, above, "[w]hen an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, supra; *J.W. Microelectronics Corp.*, supra ("It is well settled, however, that not every impropriety committed in the course of Section 7 activity deprives the offending employee of the protection of the Act. A line must be drawn between situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render

[16] *Consumer Power Co.*, 282 NLRB 130, 132 (1986) ("The protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses").

the employees unfit for further service"); *Ogihara America Corp.*, supra ("The Board has held that where 'an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service'") (quoting, *Guardian Industries Corp.*, supra). "The employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, supra (referring to profanity).

Because the incident arose in the context of Landis' concerted and protected activity, I do not believe the Employer is free to define Landis' "interference" with Shields' moving of pallets as a dischargeable offense. The protection from retaliation against employees engaged in protected activity under the Act is more robust than that. This is not to say that Landis should have gotten Shields to stop working while Landis went to get management. I will assume this is misconduct. But there was an impulsivity, a spontaneity, and a lack of serious (if any) harm to Shields, the production process, or management's authority, in the incident. There is no evidence that other employees were affected by the incident. It is worth stressing too, that while Landis managed to get Shields to stop working, there is no evidence at all that he forced him to do so. If Shields had told Landis to "jump in a lake" there is no basis to conclude anything other than that Landis would have done what he did anyway: run off to alert management. It all adds up to far less than an egregious act of misconduct "of such serious character as to render the employee[ ] unfit for further service." Under the circumstances, Landis' spontaneous reaction to Shields' performance of bargaining unit work, which resulted in a very short cessation of *unauthorized* work, that was immediately reported to management and then fixed by management, is not the kind of egregious conduct that causes an employee otherwise engaged in protected activity to lose the protection of the Act.

The contention that Landis "interfered with production" evokes—albeit, implicitly, Kingsbury never directly asserts it—the specter that Landis acted in a way that arrogated to himself management's privilege to direct employees and production, or that he seized, however, momentary, control of the production process. Kingsbury does assert (R. Br. at 1) that "Landis took matters into is own hands." He did, in that he caused Shields to stop; but he did so only for long enough to report the matter to management. If he took "matters into his own hands" it was only for as long (and it was not more than a few minutes) as necessary to alert management so that management could take the matter into its hands. I do not believe, particularly under the circumstances, that Landis' conduct can be characterized as a seizure of power or cast as a fundamental challenge to the norms of the labor-management relationship. He did not, for instance, cause Shields to stop working and end the matter there (as did the employee in *Tillford*, supra, who was reinstated by the Board). Landis went directly to management so that management could handle the issue.

Thus, the question is whether the protections of the Act are lost by an employee who spontaneously and impulsively intervenes to halt work that is unauthorized by management, promptly reports it to management, and seeks to have management intervene. That is what Landis did here, and frankly it looks more like an endorsement of management's authority and control of the workplace, than a challenge to it. Management immediately backed Landis up, and immediately assigned the work to a bargaining unit employee and away from Shields. Kingsbury admits it did not and would not have authorized Shields to move the pallets. Kingsbury admits it "it was our responsibility to stop" Shields. Landis made it possible for

Kingsbury to carry out this responsibility. In that sense he helped management take control of the plant, he did not take control from them.[17]

To discharge Landis for his conduct is to discharge him for conduct that was rooted in and part of his effort to alert management to a violation of the terms and conditions of employment, conduct that is squarely protected concerted activity under the Act. If Landis carried out this protected activity in a manner beyond accepted protocols, the error occurred without force or threat of force, and without outrageous or manifestly offensive conduct. Under the circumstances, Kingsbury's discharge of Landis, on grounds that he caused Shields to stop moving pallets while Landis questioned him and then went to get management, was a violation of Section 8(a)(1).[18]

Given my finding on the 8(a)(1) violation, I need not pass on the General Counsel's alternative dual-motivation theory that Landis' discharge violated Section 8(a)(3) of the Act. *La-Z-Boy Midwest*, 340 NLRB 80 (2003). *Shamrock Foods Co.*, 337 NLRB 915 (2002).

CONCLUSIONS OF LAW

1. The Respondent Kingsbury, Inc. (Kingsbury) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Kingsbury Shop Employees' Association (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the recognized collective-bargaining representative of a bargaining unit composed of the shop employees employed by Kingsbury at its Philadelphia operation.

4. On or about January 16, 2009, Kingsbury violated Section 8(a)(1) and (5) of the Act by unilaterally contracting out production of CH housings work typically performed by

[17]I note that in assessing Landis' conduct, we do not reach the question of whether the protections of the Act would be lost by a union president who, in premeditated fashion, roamed the plant policing the terms and conditions of employment by ordering workers to stop production, and assumed the role of manager or "approver" of any work carried out in the plant. Hyperbole aside that is not what happened here.

[18]I note that in considering Landis' conduct and his discharge, I have assumed that as part of his protected conduct he engaged in misconduct by causing Shields to stop working. However, this misconduct was not egregious, flagrant, or otherwise sufficient to cause Landis to lose the protections of the Act. In making this assumption, I have not reached the question of whether Landis would have been engaged in protected activity if, having learned that Shields was performing bargaining unit work, and given that there was no no-strike clause in effect, Landis caused a real, as opposed to this phantom interference with operations by calling an immediate work stoppage by the Kingsbury workforce. Indeed, I have not analyzed whether, under the circumstances of the lack of a no-strike clause, Landis' nonviolent, nonphysical entreaty to Shields to halt work might not be misconduct at all. I note that if it were not misconduct, then under a *Burnup & Sims* analysis Kingsbury was mistaken in its belief that Landis had committed misconduct, and any discipline would violate Section 8(a)(1) for that reason. *Burnup & Sims*, 379 U.S. 21 (1964). Again, given my conclusions, I do not reach the *Burnup & Sims* analysis.

the bargaining unit without providing the Union notice or an opportunity to bargain over the contracting out decision.

5. Since late April or early May 2009, and continuing until approximately mid-October 2009, Kingsbury violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with requested information relevant to the Union's representation of employees.

6. On or about September 18, 2009, Kingsbury violated Section 8(a)(1) of the Act by discharging employee Steven Landis for engaging in protected and concerted activity.

7. The unfair labor practices committed by Kingsbury affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of the Respondent's unlawful unilateral contracting out of the production of CH housings bargaining unit work on or about January 16, 2009. All payments to employees are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having unlawfully discharged employee Steven Landis on September 18, 2009, must offer Landis reinstatement to the position he occupied prior to his discharge, or to an equivalent position, should his prior position not exist, without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make Landis whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall remove from its files, including Landis' personnel file, any reference to his discharge, and shall thereafter notify Landis in writing that this has been done and that the discharge will not be used against him in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 4 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2009.

The Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated

by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent Kingsbury, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by unilaterally contracting out bargaining unit work without providing the Union notice and an opportunity to bargain.

b. Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by failing and refusing to provide information requested by the Union that is relevant and necessary to the Union's representational duties.

c. Discharging any employee for engaging in protected and concerted activity.

d. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

a. Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral contracting out of the production of CH housings work announced on or about January 16, 2009.

b. Within 14 days from the date of this Order, offer Steven Landis full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

[19]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

c. Make employee Steven Landis whole with interest, in the manner set forth in the remedy section of this Decision and Order for any loss of earnings or other benefits resulting from his discharge.

d. Within 14 days from the date of this Order, remove from its files, including Steven Landis's personnel file, any reference to his discharge, and within 3 days thereafter notify Steven Landis in writing that this has been done and that the discharge will not be used against him in any way.

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order

f. Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2009.

g. Within 21 days after service by the Region file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C. April 20, 2010

David I. Goldman
Administrative Law Judge

[20]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-27-10
Philadelphia, PA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally contract out bargaining unit work without providing the Union notice and an opportunity to bargain.

WE WILL NOT fail or refuse to provide the Union with information it requests that is relevant to the Union's representational duties.

WE WILL NOT discharge employees for engaging in concerted activities protected by the National Labor Relations Act.

WE WILL make whole, with interest, all employees who lost earnings or other benefits as a result of our unlawful contracting out of CH housings announced January 16, 2009.

WE WILL offer Steven Landis full reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed.

WE WILL make Steven Landis whole, with interest, for any loss of earnings and other benefits resulting from his discharge.

WE WILL remove from our files, including Steven Landis' personnel file, any reference to his discharge, and thereafter notify Steven Landis in writing that this has been done and that the discharge will not be used against him in any way

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

KINGSBURY, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.